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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 10, 1993

Mr. William F. Caton
Acting Secretary of Federal
Communications Commission
1919 M Street, NW
Washington, DC 20054

Re: Implementation of Section 309(j) of the Communications Act - Competitive Bidding (PP Docket No. 93-253)

Dear Mr. Caton:

Transmitted herewith on behalf of Telephone and Data Systems, Inc. are an original and nine copies of its Comments in the above-captioned proceeding.

In the event that there are any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

George Y. Wheeler

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act	)	PP Docket No. 93-253
	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF
TELEPHONE AND DATA SYSTEMS, INC.

George Y. Wheeler
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Suite 1000
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Its Counsel

November 10, 1993

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SUMMARY

Telephone and Data Systems, Inc. addresses in its comments many fundamental aspects of the Commission's proposals for implementation of competitive bidding selection. Our proposals are supported by an analysis prepared by Robert J. Weber, Professor of Managerial Economics and Decision Sciences at the J. L. Kellogg Graduate School of Management at Northwestern University, which is attached to our comments.

Application of Competitive Bidding. We generally agree with the Commission's proposals to include within competitive bidding initial licensing of broadband and narrowband PCS, commercial nationwide 220-222 MHz, 800 MHz/900 MHz SMR, IVDS and certain common carrier radio services. "Intermediate links" and non-commercial nationwide 220-222 MHz should be excluded.

Design of Auction Methodologies. We support open ascending bidding as the Commission's basic auction method and oppose sealed bid procedures. As a general rule, we believe that bidding should be sequenced in descending order of service area population and spectrum block size. The bidding for individual licenses could be separate or simultaneous based upon factors relevant to the specific allocation involved.

Broadband PCS Auction Sequence. Our proposal for the sequencing of broadband PCS auctions is as follows: (1) Channel Blocks A and B--descending order of market population--both 30 MHz licenses bid together using simultaneous ascending bidding; (2) Channel Blocks C and D--simultaneous ascending bidding on all BTAs comprising an MTA--also bid options to include combination bids for the 20 and 10 MHz licenses in individual BTAs; (3) Channel Blocks E through G--same as procedures for blocks C and D except that there are more combination bids possible to aggregate all or specific parts of the spectrum available in individual BTAs.

Opposition to Nationwide Bidding. We strongly oppose nationwide combinatorial bidding for broadband PCS and support the Commission's decision to decline to use combinatorial bidding for narrowband PCS licensing. Nationwide licensing of broadband PCS would be anticompetitive, inefficient, retard technical innovation, lessen incentives to develop interperability standards, diminish opportunities for rapid development in rural areas and limit the public benefits from diverse and broadly competitive industry development. In any event, if the Commission permits nationwide combinatorial bidding, the Commission should only allow licensing of nationwide systems if there are at least two nationwide combinatorial "winners."

Treatment of Designated Bidders. We support use of tax certificates, set-asides (in case of broadband PCS--channel

blocks C and D) and installment payments for all designated bidders--small business, rural telephone companies and minority/female owned businesses. The definition of rural telephone companies proposed by the Rural Telephone Coalition should be adopted. Also unjust enrichment restrictions should only apply to the licensing of set-aside channels.

Bid Collusion and Financial Qualifications. We agree with the Commission's proposals to adopt rules and policies prohibiting bid collusion. The financial qualifications of bidders (other than designated bidders) for broadband PCS licensing should be deemed satisfied if the winning bidder has paid the full amount of the winning bid. In the case of a winning "designated bidder," payment of the cash component of the winning bid and execution of installment payment obligations should be adequate to demonstrate financial qualifications.

Other Aspects of Competitive Bidding. We also propose that bidders have the option to use standby letters of credit to tender or exhibit the upfront payment amount, that the winning bidder should be required to pay 10 percent (instead of 20 percent) of the winning bid within five business days of the auction, that the Commission should permit bidding teams (up to five persons total including the "bidder") and permit them to use computers and other communications equipment if desired and that the Commission should adopt minimum bid increments, a "stopping

rule" (i.e. no bidding for five minutes) and application procedures which identify applicants with specificity.

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To: The Commission

COMMENTS OF
TELEPHONE AND DATA SYSTEMS, INC.

Telephone and Data Systems, Inc., a telecommunications holding company, on behalf of itself and its subsidiaries, which include local exchange telephone companies, its cellular subsidiary, United States Cellular Corporation, and American Paging, Inc. (collectively "TDS"), by its attorneys, submits the following Comments in response to the Commission's Notice of Proposed Rule Making regarding the implementation of competitive bidding selection procedures under Section 309(j) of the Communications Act ("NPRM").

INTRODUCTION

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") authorizes the Commission for the first time to adopt competitive bidding selection procedures which will influence in profound new ways how the Commission allocates, initially licenses and ultimately regulates radio spectrum uses. The impact of this change is already reflected in the broadband PCS rulemaking where the Commission has made important decisions about channel block size, channel block positioning between the lower and the upper 2

GHz PCS bands, options for different service area sizes and policies regarding "aggregation" which are directly responsive to Congressional objectives in the Budget Act. Implementation of competitive bidding selection gives the Commission a powerful new set of tools with which to achieve its policy goals.

The Budget Act also establishes a policy framework (Section 309(j) of the Communications Act of 1934, as amended ("Act")) to guide the Commission in formulating competitive bidding methodologies for specific auction situations. These Congressional guidelines refer both to the established goals of the Act and the further new "objectives" summarized here: development and rapid deployment of new technologies; products and services with specific reference to rural areas; promoting economic opportunity and competition; avoiding excessive concentration of licenses; disseminating licenses among small businesses, rural telephone companies and businesses owned by minority groups and women; avoidance of unjust enrichment in the licensing process; and efficient use of spectrum.

The provisions of the Budget Act also require the Commission to consider specific aspects of the competitive bidding regulations such as alternative payment schedules and "methods of calculation," performance requirements, preferences for small businesses, rural telephone companies, and minority/female-owned businesses and prevention of unjust enrichment. (Section 309(j)(4) of the Act).

In our Comments, we address many aspects of the Commission's proposals which we think will achieve the goals established by Congress, contribute to establishment of orderly and understandable bidding regulations, avoid unnecessary and potentially daunting complexity in the bidding process, make possible the rapid introduction of promising new technologies and services and minimize the cost burdens upon applicants and the Commission. We believe the auction methodology which most nearly meets all of these objectives must include open ascending sequential bidding (either oral or electronic), selection of the markets with the largest channel block size and largest populations first, use of streamlined application procedures, deposit and payment requirements which do not unfairly benefit companies with the deepest pockets, channel block set-asides for auctions among designated bidders, alternative bid payment methods for designated bidders, as well as other features described in our comments. We strongly oppose nationwide combinatorial bidding.

Because of the short time remaining before the Commission must initiate licensing of broadband PCS, we have directed our comments in most cases to the auction procedures as they might apply to auctions conducted for licenses for that service. We think this approach is also helpful because it permits the Commission and others to consider concrete examples of the approaches which we support. These and other closely related aspects of the Commission's proposals as they affect spectrum

auctions for broadband PCS are discussed in the attached statement prepared by Robert J. Weber, Professor of Managerial Economics and Decision Sciences at the J.L. Kellogg Graduate School of Management at Northwestern University ("Statement"). To facilitate Commission review, we have structured our comments to follow the order of presentation and subject headings in the Commission's NPRM.

DISCUSSION

I. Principles For Determining Whether A License Should Be Auctioned/Recommendations for Implementation.

We agree with the Commission's analysis that under the "mutual exclusivity" element of the test for "auctionability" under Section 309(j)(2) of the Act, competitive bidding should not be required for initial licensing in services where channels are licensed on a "shared use" non-exclusive basis, for all renewals of licenses and permits, and for modifications of existing licenses.

We believe that the Commission should not require competitive bidding selection for initial licensing of intermediate link, point-to-point microwave, private operational fixed microwave and CARS facilities. Existing Commission procedures requiring coordination and selection of specific frequencies in these services have been successful in avoiding harmful interference situations. There is no reason to alter current policy and practices and run the risk of undercutting the existing procedures which already promote cooperation among licensees in these services. Congress clearly intended the Commission to

promote procedures which "...avoid mutual exclusivity" (Section 309(j)(6) of the Act) and in the case of intermediate links, this Commission should decline to apply competitive bidding for this purpose.

We also support the Commission's proposal to decide whether to include or to exempt entire radio services or subsets of services on the basis of the "principal use" as demonstrated by current usage trends and, in the case of new services such as PCS, by estimates of projected use in such radio services or subset of services. The alternative "contamination" approach where provision of any service to subscribers for compensation in a particular radio service would cause that service to be subject to competitive bidding should be rejected as too restrictive and potentially highly prejudicial to classes of licensees using radio spectrum for internal communications.

In response to the Commission's preliminary analysis of the classes of radio services or subsets of radio services to be included within competitive bidding, we agree that licensed broadband PCS and narrowband PCS (NPRM, ¶ 116), commercial nationwide 220-222 MHz (NPRM, ¶ 133), 800 MHz SMR and 900 MHz SMR (NPRM, ¶ 138), IVDS (NPRM, ¶ 143) and common carrier radio services (NPRM, ¶ 147) should be included. Intermediate links, such as point-to-point microwave, private operational fixed and CARS facilities, and other services predominantly used or anticipated to be used for internal communications such as non-

commercial nationwide 220-222 MHz should be excluded for the reasons discussed above.

II. Design of Auction Methods.

Our recommendations for specific auction procedures are responsive to the legislative objectives in Section 309(j) of the Act and to the specific goals described by the Commission. (NPRM ¶ 18) We agree competitive bidding procedures should be "simple and easy to administer," be designed to "...speed new services to the public, " and "...minimize costs to applicants and the Commission." (NPRM, ¶ 18) The general approach proposed by the Commission to establish a variety of procedures for individual services seems appropriate.

(a) Proposed Bidding Method

We strongly support open ascending bidding as the Commission's basic auction method and the use of this method specifically for all broadband and narrowband PCS licensing.

Open bidding (oral or electronic) encourages the broadest possible participation in the spectrum auctions. The essential features of "open" bidding, which encourage widespread participation particularly by medium to small companies, are the disclosure both of the amount of the current high bid and the identification of the high bidder. This method maximizes the availability of information to bidders, minimizes the transaction costs of adjusting bids in light of other bidders' strategies and is generally perceived as fair to all bidders and readily understandable. Adequate protections against collusion, such as

rules against communications among bidders before and during the auction, are available and should be adopted.[1]

As described by Professor Weber, an open ascending-bid auction in practice allows a bidder to watch the auction develop, and remain active as long as the price remains below its true valuation. It also allows the bidder to watch the behavior of other participants and draw appropriate conclusions which resolve some of the objective valuation uncertainty before the final price is established. This eliminates the possibility of bidder's regret, while mitigating the price-suppressive effect of the Winner's Curse.

We disagree with the Commission's tentative conclusion to permit sealed bids in the bidding for groups of PCS licenses and the possible use of such bid methods where "homogeneous licenses are offered" or where the Commission expects very few bidders." (NPRM, ¶ 47-49). Such sealed bid procedures clearly favor the largest companies with the deepest pockets by rewarding those companies which have the resources to conduct sophisticated advance bid preparation. Other bidders, including many in designated bidder groups, simply cannot match these efforts and must rely instead on the information available from open ascending auction methods to make intelligent decisions. There are complex business interrelationships which bidders with limited financial resources must consider which are simply not relevant to the bidders with the deepest pockets. For example,

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[1] See Section V of our Comments, infra.

many expect that PCS licenses will be acquired in regional clusters, possibly aggregations of BTAs. A smaller company interested in competing for smaller individual BTAs located between BTA clusters must consider whether a tacit leader/follower relationship could emerge affecting his own technology selections, interoperability, roaming, marketing and other significant aspects of the business of his smaller company. Knowing the identities of the high bidders for such adjacent regional clusters is essential to these considerations. If a large well-financed company fails to win the competitive bidding in one market, it typically has the flexibility to buy in an adjacent market. A small local company which loses because it underestimated the market value in its sealed bid may have lost its only chance to obtain a license in the one market which because of market size or geography it is able to serve. Considering that Congress has established clear goals in the Act to encourage and enhance the opportunities for all bidders, including specifically the designated bidder groups, and that adoption of sealed bidding methods for PCS licensing is fundamentally hostile to these goals, we believe accordingly that sealed bidding should be rejected.[2]

(b) Sequence of Bidding

We generally agree with the Commission's analysis of the possible uses of sequential and simultaneous auctions. The

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[2] Seal bidding procedures are also discussed in Subsection (c), "Bidding for Groups of Licenses."

Commission's requirements seem to focus primarily on the desirability of "economically efficient aggregation of licenses." (NPRM, ¶ 52) Given the Commission's strong interest in promoting diverse participation, including participation of smaller companies, the Commission also should address the impact of sequencing upon the opportunities for licensing open to the smaller companies for whom aggregation of markets is not a practical option.

The needs of bidders with limited financial resources are best served if the bidding is sequenced in descending order of spectrum block size and service area population. In order for such bidders to make intelligent bid decisions, they must have market value information from the bidding for the largest markets and the largest spectrum blocks. Because of their limited resources, such bidders must also know the identity of the co-channel providers in the metropolitan hub markets, who will have a significant impact on service offerings, pricing, promotion, interoperability and roaming throughout a regional area. The auction methods adopted by the Commission must take account of the needs of these bidders.

Professor Weber describes the practical consequences of the foregoing upon sequencing of BTA auctions as follows:

> "It is expected that many of the firms seeking PCS licenses will lack the financial resources necessary to compete for the block-A and block-B licenses in MTAs with the largest population coverage. In addition, many of the smaller auction participants lack the human and informational resources required to estimate the true value of licenses to themselves as accurately as some of the larger participants bidding for MTA-wide licenses. Finally, the identities of

> the winners of the MTA-wide licenses, and the nature of the aggregations of licenses across MTAs acquired by those winners, will affect the value of the BTA-level licenses to other bidders. For all of these reasons, it is desirable to conduct the sale of all of the MTA-wide licenses (and announce both the winning bids and the identities of the winners) prior to the sale of the BTA-level licenses. This will facilitate a more efficient allocation of the BTA-level licenses, and at the same time will lead to higher revenues from their sale by levelling the information playing field and lessening the revenue-suppressing effect of the so-called 'Winner's Curse.'"[3]

In the case of auctions for individual PCS licenses, we support use of separate or simultaneous ascending-bid auction procedures. In the case of auctions of the individual MTA licenses in PCS channel blocks A and B, the Commission may find separate auctions for individual licenses to be expedient (particularly if these are among the first auctions held by the Commission). As the Commission gains experience, oral or electronic simultaneous ascending-bid procedures could be employed. Professor Weber describes the benefits of simultaneous ascending-bid auctions and the mechanics of this auction procedure in the attached Statement (pp. 13-14).

We propose the auctions for broadband PCS be sequenced as follows:

- Channel Blocks A and B:

The MTA markets should be sequenced from largest to smallest (in terms of population coverage). The two 30 MHz licenses in each MTA market should be licensed together using simultaneous

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[3] Statement, p. 4.

ascending-bid auctions as described in Professor Weber's Statement (pp. 14-15).

- Channel Blocks C and D:

A natural grouping would consist of all BTAs contained within a single MTA. We propose that the aggregation of the two channel blocks within each BTA in the group be offered as an item for bid as well as the individual channel blocks. Firms would be allowed to bid simultaneously on licenses in all of the listed BTAs. Thus, firms would be allowed to bid for any or all of the individual BTA licenses within the MTA and/or for the any or all of the aggregation of pairs of licenses within each BTA.

- Channel Blocks E through G:

We propose that the same procedure be used here as was proposed for the auction of the C and D blocks. The only change is that more possibilities for aggregation of blocks within a BTA will exist. Two levels of detail are worthy of consideration. At the greater level of detail, all seven subsets (E,F,G,EF,EG,FG, and EFG) can be listed for each BTA. At a lesser level of detail, four subsets (E,F,G and EFG) can be listed for each BTA. We prefer this lesser level of detail until the Commission gains more experience with auctions. Professor Weber reviews the considerations which led to our adoption of the foregoing proposals in his Statement (pp. 11-19).

(c) Bidding For Groups of Licenses.

We strongly oppose all of the nationwide combinatorial bidding options proposed or discussed by the Commission for

broadband PCS licensing and support the Commission's related decision to decline to use combinatorial bidding for narrowband PCS licensing.

Nationwide licensing possible under one of the combinatorial options being considered by the Commission should not be permitted, and in any event should not be encouraged for all of the reasons which the vast majority of comments and reply comments in the PCS docket have previously presented. These include diminishing the number of independently operated "regional" service areas, retarding the development of technologies and innovative service offerings, limiting the opportunities of companies which already have relevant operating experience in the regional area intended to be served and of other companies which do not have the deep pockets to bid on a nationwide basis.

Professor Weber's Statement contains an extensive analysis of additional factors which confirm that nationwide combinatorial bidding would disserve the public interest. These factors include its potential for noncompetitive or anticompetitive behavior ("...the offering of nationwide licenses at auction raises the possibility of an effectively-noncompetitive market evolving for PCS. In only one nationwide license is awarded, the nationwide licensee will have the ability to focus attacks against specific regional or single-MTA service providers."[4]) and its likelihood of inefficient license allocation ("...the threat of one nationwide 30 MHz block being sold to a single firm will

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[4] Statement, p. 6

lessen the amounts that other firms, lacking the resources to enter a nationwide bid, would be willing to bid for individual or regional licenses on the other 30 MHz block").[5] Professor Weber also discusses retardation of technical innovation, lessened incentives for the development of interoperability standards, lack of corporate focus on markets other than the most profitable and lack of regulatory comparisons as resulting from licensing of nationwide systems. See Statement, pp. 9-10.

The Commission should also consider the analysis of the foregoing matters by Steven S. Wildman, Associate Professor of Communication Studies and Director of the Program in Telecommunications Science, Management and Policy at Northwestern University which we filed as an attachment to our comments dated November 9, 1992 in the PCS rulemaking proceeding (GEN Docket No. 90-314).[6] Professor Wildman describes how large service areas "...significantly constrain the market's ability to experiment with new approaches to PCS.[7]" He also discusses how large service areas inhibit the development of services to meet the needs of smaller communities and why it is important to encourage licensing flexibility to development geographic configurations of

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[5] Statement, p. 8

[6] Professor Wildman's analysis is entitled "Economically Efficient Licensing Policies for Personal Communications Services."

[7] ID. at 15-18.

PCS operations which promote service to small communities and rapid deployment of PCS technologies.[8]

We strongly disagree with those who argue that the participation in a consortium is an adequate alternative for companies not individually capable of bidding for nationwide licensing. In order for the Commission to encourage significant contributions in terms of new or expanded PCS service capabilities or other innovations, the Commission must realistically be in a position to offer true licensing opportunities for individual companies because licensing opportunities confer the full level of control over operations which an innovator needs. The rights of a licensee to control PCS operations cover all of the most important elements of system operation including technology selection, technical operations, the service offerings which the PCS system offers, the availability/pricing of specific offerings. By encouraging providers to compete for their own licenses, the Commission expands the opportunities for consumer benefits from experimentation, innovation, and active competition.

Because we strongly oppose nationwide combinatorial bidding, we also recommend that the Commission not permit a sole nationwide system to be licensed. If nationwide licensing is permitted at all, it is essential that there be a minimum of two such providers to diminish the potentially dominant anticompetitive position of sole nationwide provider. The

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[8] Id. at 18-21.

Commission should only permit the combinatorial nationwide licensing if there are at least two combinatorial nationwide "winners." The auction procedures to accomplish this are discussed in Professor Weber's Statement (pp. 11-12).

We also propose that, if a nationwide combinatorial bidding is allowed, in fairness to the bidders for individual MTA markets, the amount and the identity of the high combinatorial bids should be announced in advance of the bidding on individual markets covered by the combinatorial bid. The other entities filing combinatorial bids would then be free and able to evaluate the opportunities for obtaining individual MTA markets and to submit their bids for individual markets. This also keeps firms that do not submit nationwide bids from being at an information disadvantage as against the high bidders for nationwide combinatorial licenses.

In no event should the Commission permit additional bidding rounds after the individual MTA rounds of bidding have been completed. This would be grossly unfair to the companies tentatively selected to hold individual MTA licenses and would tend to discourage widespread participation in individual MTA license auctions.

(d) Minimum Bid Requirements

Considering the intense interest in PCS licensing, there seems little benefit in setting a refusal or "reserve" price for any particular PCS license. Setting such a price would be very difficult for the Commission in any event because the value of

the licenses will vary based upon the relative capital costs of migrating co-channel private microwave users and other variables affecting the cost of construction and initial operations of a PCS system in any market.

(e) Payment Methods

We agree with the Commission's proposal to require payment in full of the winning bid amount for all bidders other than designated bidders within a "short period" after grant and to permit installment payments of their winning bids by designated bidders over the initial license term. The Committee Report describing the language of the House Bill subsequently adopted in Section 309(j)(4) of the Act gives as an example "...only minimal payments during the construction phase followed by higher payments as a revenue stream develops, and perhaps with a balloon payment at the end of the license term."[9] We agree with this general approach to the timing and amount of installment payments. We think that designated bidders should pay interest on the amount of the deferred balance and that interest should be calculated on the basis of the government's cost of money.

III. Treatment of Designated Bidders

We support use of tax certificates, set-asides, and installment payments as stated in Section 309(j)(4) of the Act "...to ensure that small businesses, rural telephone companies and businesses owned by minority groups and women are given the

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[9] Committee Report, "Licensing Improvement Act of 1993," p. 20.

opportunity to participate in the provision of spectrum-based services." For broadband PCS licensing, we also support the set-aside of channel blocks C and D where only the members of the designated bidder groups referenced in Section 309(j) are eligible to bid. All designated entities should be permitted to use installment payments and tax certificates to ensure their economic viability.

We support adoption of the definition of rural telephone companies proposed by the Rural Telephone Coalition, comprised of the National Rural Telecom Association, the National Telephone Cooperative Association and the Organization for the Protection and Advancement of Small Telephone Companies.

In response to the Commission's inquiry regarding the eligibility criteria for consortia, we believe the Commission should adopt a "more than 50%" ownership standard and require that control reside solely with the designated bidder entities. All third party participants should be passive. In other words, a qualifying consortium would need to demonstrate that more than 50 percent of the ownership of the consortium is in the hands of qualifying entities or individuals and that control is exercised exclusively by them.

IV. Unjust Enrichment

We agree with the Commission that in an unlimited bidding process, the winning bid represents the market price for the license involved so that resale does not involve unjust enrichment. We support the Commission's proposals to limit the

application of its proposed unjust enrichment restrictions to the licensing of designated bidder channels, channel blocks C and D.

We believe that the Commission's policies should not include an outright prohibition on transfer of a license on a designated bidder channel. Specifically, we propose that the Commission not preclude the transfer of any such channel to an entity that does not qualify under one of the designated bidder categories where the transferor agrees to pay the full amount of all deferred portions of the winning bid for that channel into the Treasury. Limiting the amounts due upon early transfer to acceleration of the deferred balance is appropriate if, as we believe, bidding for the designated bidder channels may well draw very widespread participation and could yield very high winning bids exceeding those for other comparable spectrum blocks.[10] Transfers of channels from one designated entity to another should not be subject to unjust enrichment restrictions.

V. Prohibition of Collusion

We agree that the Commission should prohibit all potential bidders from collaborating or otherwise discussing with one another any information regarding the bids to be submitted or bidding strategies prior to the completion of the auction and the award of licenses. Collusive activities which hinder or restrain

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[10] As discussed separately with respect to demonstration of financial qualifications in Section VI of these comments, we expect that the bidding on the designated bidder channels will reach true market rates and could actually achieve premium rates above market levels because of installment payment options available to designated bidders.